Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LEE JOHNSON and
VERONICA MOODY JOHNSON, PRO SE,
Petitioners,

v.

EMERALD GREENS PROPERTY OWNERS
ASSOCIATION BOARD OF DIRECTORS, et al,
Respondents.

v.

EMERALD GREENS PROPERTY OWNERS
ASSOCIATION,
Respondents.

Companion Case I, FCCA Case No. 99-2256
Veronica Moody Johnson v. City of Chesapeake, et al
Companion Case II, FCCA Case No. 02-1371
Christopher Lee Johnson & Veronica Moody Johnson
v. City of Chesapeake, et al

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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118??

QUESTION PRESENTED

Preface:

The all white Board of Directors of black petitioners' homeowners association filed suit against them to enforce a homeowners association's restrictive covenant against them while the Board was undisputedly currently openly allowing numerous white equal members of the association to enjoy the same restrictive covenant privilege which the Board had sued black petitioners to have denied but did not sue the white members.

Question:

Whether the petitioners have a constitutional right to a jury trial pursuant to the Seventh Amendment to the Constitution of the United States upon presenting threshold evidence sufficient to support petitioners' racial discrimination counterclaim of selective enforcement of a homeowners association's restrictive covenant?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs (appellees) in the Fourth Circuit Court of Appeals was the Emerald Greens Property Owners Association who filed suit against defendants (appellants, third-party plaintiffs, defendants), Christopher Lee Johnson and Veronica Moody Johnson, pro se.

The third-party defendants (appellees) are the Emerald Greens Property Owners Association Board of Directors, jointly and severely and in their individual capacity, personally, (immediate, past and present members); Mike Lewis, President; Richard Matthews; Craig Poppin; Mark Williams; Peter Nichols; Kathy Thomas; Anne Del Core and David Thompson.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ask that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals denying petitioners' , pro se, petition for rehearing and rehearing en banc of its decision by per curiam opinion to affirm the summary judgment order of the United States District Court, Eastern District of Virginia, Norfolk Division, upon petitioners' racial discrimination counterclaim against respondents for selective enforcement of a homeowner association restrictive covenant against them in favor of white members of the association in violation of 42 U.S.C. 1981, 42 U.S.C. 1982, and the Civil Rights Act of 1866. The Board of Directors of the Emerald Greens Homeowners Association is all white. Petitioners are black.

OPINIONS BELOW

The Fourth Circuit Court of Appeals entered an order denying petitioners' petition for rehearing and rehearing en banc. Said order dated June 17, 2002, is attached in the Appendix to this petition as Exhibit A.

The Fourth Circuit Court of Appeals denied petitioners' appeal, affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division. Said order is dated May 14, 2002, the Honorable Judges Wilkins, Williams, & Motz, acting, and is

attached in the Appendix to this petition as Exhibit B.

The order and opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, granting summary judgment against petitioners dated October 25, 2001, the Honorable Jerome B. Friedman, acting, is attached in the Appendix to this petition as Exhibit C.

The foregoing order was amended on October 30, 2001, and the same is attached in the Appendix to this petition as Exhibit D.

The summary judgment motion proceeding of October 16, 2001 corresponds to the October 25, 2001 and an October 30, 2001 order has been transcribed and is attached as Appendix E.

Fourth Circuit Court of Appeals Order in companion case no. 99-2256 is attached as Appendix F.

JURISDICTION

The Fourth Circuit Court of Appeals entered an order on June 17, 2002, denying Christopher Lee Johnson and Veronica Moody Johnson, petitioners, requests for rehearing and rehearing en banc upon the Fourth Circuit Court of Appeals' decision to affirm the order of the United States District Court for the Eastern District of Virginia, Norfolk Division, granting summary judgment to respondents on petitioners' Amended Bill of Complaint for racial

discrimination (counterclaim). The Fourth Circuit Court of Appeals order is Exhibit A in the Appendix to this petition.

The jurisdiction of this court is invoked pursuant to 28 USCA Section 1257 and Rule 10(b) of the Rules of the Supreme Court for the United States. The latter provides that a review on writ of certiorari may be considered "when a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States Court of Appeals." United States Supreme Court Rule 10(b)

Pursuant to Rule 13 of the Rules of the Supreme Court this petition is timely filed within 90 days after entry of the judgment of the United States Court of Appeals, specifically the order entered on June 17, 2002 by the Fourth Circuit Court of Appeals denying petitioners' rehearing.

Said petition having been resubmitted within 60 days of notice by the clerk of this United States Supreme Court dated September 17, 2002, that the petition did not comply with the rules of this Court as previously submitted and resubmission is allowed by the Rules of this United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The 7th (Seventh) Amendment to the Constitution of the United States provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The 14th (Fourteenth) Amendment of the United States Constitution provides that: "Section 1. *Rights guaranteed* - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Rule 56 of the Federal Rules of Civil Procedure provides that: "the district court may enter summary judgment when the motion papers, affidavits, and other evidence submitted to the court show that no genuine issue exists as to any material facts, and that the moving party is entitled to judgment as a matter of law."

4. Rule 11 (signing of pleadings, motions, and other papers; representations to court; and sanctions) of the Federal Rules of Civil Procedure provides that:
"(b) Representations to Court: By presenting to the court (whether by signing, filing, submitting,

or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances -

(1) it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

5. 42 U.S.C. 1981 provides that:

"*(a) Statement of equal rights.* All persons within the jurisdiction of the United State shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(b) *"Make and enforce contracts" defined.* For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

6. 42 U.S.C. 1982 provides that: "All citizens of the United States hall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

7. The Civil Rights Act of 1866, Section 1 and Section 10 provide as follows respectively:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude,

except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Section 10. And be it further enacted, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

CONSICE STATEMENT OF THE CASE

On October 22, 1998, the plaintiff, Emerald Greens Property Owners Association (hereinafter called the "EGPOA") filed a Bill of Complaint in Chesapeake Circuit Court to enforce restrictive covenants against black defendants, Christopher Lee Johnson and Veronica Moody Johnson, (hereinafter called the "Johnsons") alleging that they had **located** their brick fence in violation of the "rear corner rule" of the associations covenants despite the fact that plaintiff EGPOA, with its all white Board of

Directors, was allowing numerous white members of the association to openly enjoy placement of their fences in violation of the "rear corner rule", but did not sue them in violation of the Civil Rights Act of 1866, 42 U.S.C 1981, and 42 U.S.C. 1982; in contravention of the terms of their own recorded covenants which respondent was allegedly enforcing. The **location** is the only issue related to the "rear corner rule" selective enforcement. The brick construction is not an issue as could be inferred by the court's opinion. Rule 11 of the Federal Rules of Civil Procedure was also violated in that plaintiffs' counsel, Mike Inman, as a matter of record, knew that the "rear corner rule" covenant provision (See United States District Court Dkt. No. 149, Exhibit 1, page 29, paragraph (p)) was not being uniformally enforced in violation of the recorded declaration of covenants and restrictions of the Emerald Greens Property Owners Association but sued black petitioners dispute this. (See United States District Court Dkt. No. 149, Exhibit 1, Lewis Bridges Expert Witness Report beginning at page 12 and continuing to page 45.)

The "Johnsons", petitioners, filed an amended Bill of Complaint (counterclaim) "affidavit" that white members of the EGPOA at 1228 Masters Row, 1232 Masters Row, 1208 Brassie Court, 1132 Masters Row, 1100 Masters Row, 1417 Baffy Loop, 1441 Baffy Loop, and 1216 Masters Row had fences in front of the rear corner of their dwellings in violation of the "rear corner rule" at the time respondents sued petitioners but that white members of the association were not sued. See Dkt. No. 56.

On July 11, 2000, after almost 20 months of no progress in Chesapeake Circuit Court, the defendants had their case removed to the United States District Court based on their counter-claim of selective enforcement of restrictive covenants in violation of 42 U.S.C. 1981, 42 U.S.C. 1982, and the Civil Rights Act of 1866, as well as other federal claims. Defendants had been ordered to file an answer and any counterclaim they desired by Judge Bernard Goodwyn in Chesapeake Circuit Court who was the third judge to preside in this case. The defendants were not required to file their answer and counterclaim when a trial on their plea in equity was to be had. This is the reason that no answer was required to be filed until Judge Goodwyn rescinded Judge Creekmore's order granting defendants a jury trial upon their plea in equity. Judge Goodwyn ordered defendants to file an answer and any counterclaim after he overruled a fellow sitting Chesapeake Circuit Court Judge who was senior to him. Judge Bernard Goodwyn rescinded the order of December 1, 1999 issued by Senior Judge Frederick Creekmore granting defendants a jury trial upon their plea in equity after they had waited 15 months to get an order on their plea. Judge Creekmore was the second judge; however, he was asked by plaintiffs' counsel to recuse himself for granting defendants a jury trial upon their plea in equity to which plaintiffs had filed no motion to strike whatsoever as required if they wished to challenge defendants' plea in equity.

The first judge in the Chesapeake Circuit Court, Chief Judge, Thomas V. Forehand, in this case was asked by the defendants to recuse himself when he responded when asked on the record that he owned real estate with Greg Larsen, an attorney and former member of the Board of Directors of the Emerald Greens Property Owners Association, respondent. Greg Larsen held office as a Board member within the term of this controversy. The original case filed in Chesapeake Circuit Court by respondent to enforce restrictive covenants has been alleged by sworn affidavit, Dkt. No. 56, the Amended Bill of Complaint to be frivolous. The complaint was filed by attorney Mike Inman who has admitted pursuant to the pleadings in this case specifically that he knew the covenants were not being uniformally enforced in violation of the recorded declaration of covenants and restrictions of the Emerald Greens Property Owners Association (See United States District Court Dkt. No. 149, Exhibit 1, page 12, paragraph 4). The complaint filed against petitioners is not supported by fact nor law with regard to enforcement of the "rear corner rule". The factual allegation that plaintiffs' lawsuit is frivolous is a basis for petitioners' racial discrimination claim and whether or not the filing of the lawsuit was frivolous is as well a factual question for a jury. See Rule 56(c).

Respondents have not put forth any evidence to refute that the "rear corner rule" of the EGPOA restrictive covenant has not been selectively enforced or any proof that it has been consistently enforced. On the contrary,

respondents admitted that the "rear corner rule" has not been consistently enforced. On October 25, 2001, the Honorable Judge Jerome B. Friedman granted summary judgment to plaintiff, EGPOA and third-party defendant Board of Directors of the EGPOA, on petitioners' racial discrimination counterclaim and denied petitioners motion for summary judgment against plaintiff, EGPOA, on their Bill of Complaint to enforce restrictive covenants. The court also remanded plaintiffs original Amended Bill of Complaint to enforce restrictive covenants against defendant "Johnsons" back to state court to be tried "in a vacuum", effectively blocking petitioners opportunity to prove selective enforcement of restrictive covenants, which is the basis of petitioners' racial discrimination counterclaim, thus making the conclusion of fact that the "rear corner rule" was not being selectively enforced, denying this decision to be made by a jury.

On May 14, the Fourth Circuit Court of Appeals denied petitioners appeal in a per curiam opinion. The Honorable Justices Wilkins, Williams, and Motz, acting.

On June 17, 2002, the Fourth Circuit Court of Appeals denied petitioners' motion for rehearing and rehearing en banc. It is from this ruling that defendants, petitioners, pro se, seek relief.

The companion case to this case, Christopher Lee Johnson and Veronica Moody Johnson vs. The City of Chesapeake, et al, is pending before the Fourth Circuit Court of Appeals since July 8, 2002, Fourth Circuit Court

of Appeals, Case No. 02-1371, United States District Judge Jerome B. Friedman, unconstitutionally denied the same petitioners, pro se, their right to a jury trial pursuant to the Seventh Amendment of the Constitution of the United States, in that case making the conclusion of fact that Christopher Lee Johnson and Veronica Moody Johnson, petitioners, were not entitled to a jury trial to prove arbitrary and capricious conduct by the Planning Commission and the City Council of the City of Chesapeake for unconstitutionally denying them a special exception. This is the basis for their claim of 14th Amendment violation and violation of 42 U.S.C. 1981 and violation of 42 U.S.C. 1982. Petitioners met every written statutory guideline listed in the applicable ordinance. United States District Judge Jerome B. Friedman in the case of Veronica Moody Johnson vs. The City of Chesapeake, et al, Fourth Circuit Court of Appeals Case No. 99-2256 decided February 25, 2000, was previously reversed in part by the Fourth Circuit, having unconstitutionally previously dismissed Veronica Moody Johnson's claim, pro se, for money damages for 14th Amendment violations. Christopher Lee Johnson was added to the City of Chesapeake case on motion of defendant after the case was remanded from the Fourth Circuit Court of Appeals in this first case.

The statement in the Federal Court of Appeals Rehearing denial order of June 17, 2002, which reads, "and the motion to correct the record on appeal is denied" refers to a motion made by petitioner, Veronica Moody

Johnson, regarding there being no specific listing of the expert witness report of Lewis Bridges (United States District Court Dkt. No. 149) on the docket sheet. Upon personal examination by Veronica Moody Johnson of the file in this case at the clerk's office of the Fourth Circuit Court of Appeals in Richmond, Virginia, It was revealed that document number 149 was not contained within sequential volumes and labeled as other pleadings. This motion and its denial is a moot point in that the transcript of the summary judgment motion proceeding of October 16, 2001 in the United States District Court reveals that Judge Friedman saw this document. The motion is of no effect. This motion is of no effect for the purpose of this petition or appeal.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT'S ACTION AS AFFIRMED BY THE FOURTH CIRCUIT COURT OF APPEALS IN SUBSTITUTING ITSELF AS THE TRIER OF FACT IN THIS CASE IS IN CONFLICT WITH ACCEPTED LAW WITHIN THE FOURTH CIRCUIT ITSELF AND WITHIN OTHER CIRCUITS.

Petitioners have a constitutional right to a jury trial in this case pursuant to the Seventh Amendment of the United States Constitution.

Pursuant to *Charbonnages De France v. Frank B. Smith, et al*, 597 F2d. 406, (Fourth Circuit 1979)

1. Summary judgment is not appropriate even if there is no dispute as to evidentiary facts, but only as to conclusions to be drawn therefrom. Fed. Rules Civ. Proc., Rule 56(c).

2. Burden is on moving party for summary judgment to show that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law; in determining whether such showing has been made, evidence as forecast in documentary materials before the district court must have been assessed in light most favorable to opposing motion. Fed. Rules Civ. Proc., Rule 56(c).

3. When non-moving party on motion for summary judgment would at trial carry the burden of proof, such party is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflict resolved favorably to him, most favorable of possible alternative inferences from evidence drawn in his behalf and to be given benefit of all favorable legal theories invoked by evidence so considered. Fed Rules Civ. Proc., Rule 56(c).

4. Summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of claim or defense in as much as whether as a matter of fact a particular state of mind exists can seldom be considered to be beyond reasonable dispute

as it depends entirely on conflicting inferences to be drawn from evidence which is likely to be circumstantial or, if direct, self-serving. Fed. Rules Civ. Proc., Rule 56(c).

5. Disputes about whether a contract has been formed as a result of words and conduct over a period of time are disputes about states of mind in that they involve not only the subjective intentions had by the several parties, but also what state of minds, what understandings, their manifestations of intention may have induced in others; such subjective states an objective manifestation of intention present interpretative issues traditionally understood to be for the trier of fact. Fed. Rules Civ. Proc., Rule 56(c).

The above stated points demonstrate, pursuant to the facts in this case, that petitioners have been denied their Seventh Amendment Constitutional right to a jury trial in this case.

In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by

collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

Then in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.

In this case, remanding the original claim against petitioners, defendants, Christopher Lee Johnson and Veronica Moody Johnson was not only in contravention of judicial economy, but a violation of due process in that remanding the original case back to Chesapeake Circuit Court exposes petitioners to the likelihood of a legally unsupported battle over collateral estoppel challenges and undue delay in having this case fully adjudicated. This case should remain joined as federal judiciary procedure provides, especially in the case of a civil rights, pro se litigant.

If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the

equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545 (1990). However, dividing this case is violative of judicial economy.

2. **THE LOWER COURT, IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS UPON PETITIONERS' COUNTERCLAIMS AGAINST RESPONDENTS FOR SELECTIVE ENFORCEMENT OF RESTRICTIVE COVENANTS IN VIOLATION OF 42 U.S.C. 1981, 42 U.S.C 1982 AND THE CIVIL RIGHTS ACT OF 1866 SUBSTITUTED ITSELF AS THE TRIER OF FACT IN THIS CASE; PETITIONERS HAVING PRESENTED NUMEROUS ITEMS OF SWORN AND OTHER EVIDENCE SUFFICIENT TO MEET THE THRESHOLD REQUIRED TO OVERCOME SUMMARY JUDGMENT, SAID EVIDENCE REFUTING EVERY CLAIM MADE BY RESPONDENTS IN THEIR SUMMARY JUDGMENT MOTION.**

Petitioners restate the argument in Number 1 above in support this reason.

3. **UNITED STATES DISTRICT COURT JUDGE JEROME B. FRIEDMAN HAS REPEATEDLY VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS WHICH IN THIS CASE HAS BEEN UPHELD BY THE FEDERAL COURT OF APPEALS.**

This instance is the third time Judge Jerome B. Friedman, United States District Judge for the Eastern District of Virginia, Norfolk Division, has denied petitioners their constitutional rights. Judge Friedman has been previously reversed by the Fourth Circuit Court of Appeals in companion case number 99-2256, Veronica Moody Johnson vs. The City of Chesapeake, et al, for unconstitutionally dismissing petitioner Veronica Moody Johnson's claim for money damages against the City of Chesapeake, et al, defendant, for arbitrary and capricious denial of a special exception. See Petitioners' Exhibit F, United States Court of Appeals for the Fourth Circuit, Unpublished Opinion, decided February 25, 2000.

In addition, Judge Jerome B. Friedman, United States District Judge for the Eastern District of Virginia, Norfolk Division, violated petitioners' rights to a jury trial pursuant to the Seventh Amendment to the United States Constitution when he denied petitioners the right to prove arbitrary and capricious denial of a special exception by the City of Chesapeake, et al, as evidence forming the basis of petitioners' racial discrimination claim in violation of the 14th Amendment. This case is now pending before the Fourth Circuit Court of Appeals, Case No. 02-1371.

United States District Judge Jerome B. Friedman, as affirmed by the Fourth Circuit Court of Appeals, substituted himself as the finder of fact in the foregoing stated case over a mountain of sworn and other evidence to include 17 sworn depositions each with exhibits, 21

evidentiary exhibits filed with the amended Bill of Complaint in the case, sworn transcripts of all three of the public hearings in the matter, and petitioners' sworn affidavits that the defendant, City of Chesapeake's denial of petitioners' special exception was a pretext for racial discrimination. Petitioners were denied their special exception after having met every written requirement enumerated in the applicable Chesapeake City Ordinance and when the Mayor himself testified in his sworn deposition which is part of the record that denial of petitioners, Christopher Lee Johnson and Veronica Moody Johnson's, special exception application was not necessary for the protection of the public health, safety or welfare.

Petitioners in the case of Christopher Lee Johnson and Veronica Moody Johnson vs. the City of Chesapeake, et al, moved in that case to have United States District Judge Jerome B. Friedman recused at the beginning of this case. See United States District Court Dkt. No. 40. Petitioners' recusal motion was based on Judge Friedman's comments from the bench in the beginning of the case wherein he expressed his opinion stating conclusions of fact which pertained to both companion cases, said conclusions being constitutionally reserved for a jury to decide. Petitioners alleged in their recusal motion that Judge Friedman was already predisposing their case to prejudice and bias as reflected in Judge Friedman's consistent denial of the constitutional rights of Christopher Lee Johnson and Veronica Moody Johnson,

petitioners, both in this case and the companion case.

Overall, respondents did not support their motion for summary judgment with any specific facts as required by Rule 56(c) and therefore, were not entitled to a summary judgment as a matter of law. Respondents never met their burden of proof in this racial discrimination case to come forth with any evidence whatsoever to rebut that the restrictive covenant sought to be enforced against petitioner was not currently being selectively enforced in favor of white members of the homeowners association. The respondent instead set forth a variety of contradictory excuses upon the record in their affidavits as to why the "rear corner covenant" provision has not been equally and consistently enforced. The decision as to whether or not these reasons were a pretext for racial discrimination is a jury issue and should not have been decided by Judge Friedman. See Rule 56(c).

None of respondents' affidavits filed contained any specific facts whatsoever required by Rule 56 to refute petitioners' sworn evidence that numerous white members of the association were currently being allowed to openly enjoy not complying with the "rear corner rule" covenant provision without being sued when petitioners were sued. Respondents never presented any specific facts to show that they were entitled to summary judgment as a matter of law as required by Rule 56.

Sworn evidence items presented by the petitioners, defendants, which were disregarded

by the Honorable Judge Jerome B. Friedman in the United States District Court (in unconstitutionally substituting himself as fact-finder) being upheld by the Fourth Circuit Court of Appeals having denied petitioners' rehearing consist of: (in part) United States District Court For the Eastern District of Virginia, Norfolk Division, Dkt. Nos. 56; Dkt. No. 149 – Exhibit 1, Lewis Bridges' Expert Witness report; the following pages contained within: page 6, pages 12-45, page 61, pages 63-67; Dkt. No. 149, Exhibit 2 – sworn affidavit of Rufus Cheatum; Dkt. No. 162; Dkt. No. 173; and Dkt. No. 183.

The petitioners clearly pointed out issues of material fact to be presented to a jury in United States District Court, Dkt. No. 162 at page 10.

Defendants, petitioners, rebutted the adequacy of respondents' sworn affidavits in United States District Court, Dkt. No. 162, page 6, paragraph 1, referring to the Lewis Bridges Expert Witness Report, Dkt. No. 149, which could be put on as evidence at trial by Lewis Bridges in person, in that he, had been timely disclosed as an expert witness and could testify to personal knowledge of the existence of certain "rear corner rule" fence placement violations which defendant petitioner has stated in sworn evidence (with a portfolio of photographic exhibits attached, Dkt. No. 56) belonged to white members of the association at the time respondents sued petitioners. Evidence in support contained in Dkt. No. 162, page 10, paragraph 2. It is a jury function to forecast the evidence; Rule 56(c). A defendant is not

required to depose his own witnesses for the purpose of summary judgment. See Rule 56(c).

4. **THE LOWER COURT EXAMINED THE EVIDENCE FOUND WITHIN THE SWORN DEPOSITIONS OF CHRISTOPHER LEE JOHNSON AND VERONICA MOODY JOHNSON AND MADE CONCLUSIONS OF FACT BASED THEREON. CONCLUSIONS OF FACT BASED ON EXAMINATION OF DEPOSITION EVIDENCE IS A FUNCTION RESERVED FOR A JURY.**

The above stated act by the Honorable Judge Jerome B. Friedman, rehearing having been denied by the Fourth Circuit, constitutes a violation of the Seventh Amendment of the Constitution of the United States and Rule 56(c) of the Federal Rules of Civil Procedure.

5. **THE LOWER COURT DISREGARDED THE EXISTENCE OF CREDIBILITY EVIDENCE PRESENT IN THE RECORD AGAINST ONE SPECIFIC BOARD MEMBER, RESPONDENT, WHO IS ALSO AN ATTORNEY, MAKING A CONCLUSION OF FACT AS TO RESPONDENTS' CREDIBILITY. CREDIBILITY ISSUES ARE STRICTLY RESERVED FOR A JURY PURSUANT TO RULE 56 (c).**

Respondent, third-party defendant, EGPOA board member, Richard Matthews, who is also an attorney, filed a third-party motion to substitute attorney Paul Driscoll from Pender & Coward law firm of which the record reflects

Matthews, is a third-party defendant, respondent, is CEO, to litigate against defendants. See United States District Court Dkt. No. 125.

An excerpt from the transcript of that motion hearing dated August 29, 2001, presided over by the Honorable Tommy E. Miller, United States Magistrate Judge is as follows: See United States District Court Dkt. No. 190.

> "THE COURT: All right. I'm going to take up the motion for substitution of counsel first.
>
> **Mr. Driscoll, are you buying yourself a lawsuit for malpractice and conflict?**
>
> MR. DRISCOLL: Your Honor, may it please the court, for the record, my name is Paul Driscoll with the firm of Pender & Coward. We are seeking to substitute Inman & Strickler as counsel for the association.
>
> The association has met. It has waived the conflicts, and we are ready to undertake representation.
>
> THE COURT: Let me just see – The association is not here, the board of directors is not here; right?
>
> MR. DRISCOLL: Its president is here, Your Honor.
>
> THE COURT: All right. Mr. Matthews is an individual defendant in this case, third-party defendant?
>
> MR. DRISCOLL: Yes, sir.

THE COURT: He is also a member of the board; is [page 4] that correct?

MR. DRISCOLL: Yes, sir.

THE COURT: Now, this is, what, my fourth hearing in this case, third hearing – you don't know; you haven't been here.

MR. DRISCOLL: This is my first, Your Honor.

THE COURT: There have been several. I can see ten ways from Sunday that Mr. Matthews and your firm's representation of him would be a potential conflict of interest and that Mr. Matthews, being a personally named defendant, could be accused – and I have respect for Mr. Matthews; he is in this court frequently – could be accused of **manipulating the litigation for his personal benefit**, as opposed to for the association's benefit.

It may be an improper accusation. But are you an associate or partner at Pender & Coward?

MR. DRISCOLL: I'm an associate, Your Honor.

THE COURT: And you are going to be the lead counsel in this matter, and Mr. Matthews is – occasionally I read bar publications – periodically he has been the managing partner at Pender & Coward, has he not?

MR. DRISCOLL: He is presently the chief executive officer.

THE COURT: I am going to not allow the substitution motion. I just think

that there are so many [page 5] potentials for harm **and for further lawsuits against Mr. Matthews, against you, ethical complaints against both of you**, and not only by the board of directors of the association, but by individual members of the association. They could end up suing the association for having Mr. Matthews – **accusing Mr. Matthews and you of self-dealing in the representation here**.

The association is the one that brought the lawsuit, and they selected Inman's firm, and that's the way it is going to stand right now. So I'm not going to allow it.

MR. DRISCOLL: Very well, then, Your Honor.

THE COURT: You have a right to note an appeal of this decision, and I will put it in writing, and you can note the appeal within ten days.

Mr. Koch, front row.

MR. KOCH: Yes, sir.

THE COURT: All right. The next motion is, I think, the Board of Directors' motion for sanctions.

MR. HARISTON: Yes, sir. Good morning, Your Honor.

Your Honor, the basis for our motion is simply the fact that we have been trying since October of last year to obtain answers to very straightforward..."

* * *

[page 16]
"have ruled. I ruled last July. And whatever you've submitted, you are frozen in that position. Have a seat.

Call Ms. Cherry, if you would.

I don't believe there are any other motions except to set the date of the final pretrial conference.

MR. HARISTON: That's correct, Your Honor. But while we are here, we would like to just go ahead and set the motion for summary judgment for a hearing.

THE COURT: If Ms. Cherry can do it, she is in command of the calendar book, not me.

MR. HARISTON: Yes, sir.

THE COURT: **Mr. Matthews and Mr. Driscoll, occasionally lawyers need to be saved from themselves. I think that's what I have done.**

MR. MATTHEWS: I understand, Your Honor.

THE COURT: **Having made my third ethical complaint against a lawyer in 28 years last week, maybe I'm attuned to that this week. It's not a pleasant experience for a judge, or anybody else.**

Ms. Cherry, as you well know – or I think you know – this case was continued from, I think it was October 8 or 9, to November 28.

We did not continue the final pretrial conference. I have just granted a

motion to continue the final pretrial from sometime in September for the November 28 trial date to ..."

* * *

The foregoing transcript excerpts established a question of respondent, third-party defendant, attorney Rick Matthews' credibility. The foregoing also established a factual issue of undue influence by an attorney within the Board of Directors of the Emerald Greens Property Owners Association, respondent, and it is seemingly clearly inferred by Judge Miller in the foregoing excerpts of transcript, however, whatever factual interference there is to be made is constitutionally to be made by a jury. Undue influence by an attorney who is a member of the Board casts dispersions on all actions of the Board and this is a reasonable inference which a jury pursuant to Rule 56(c) should have been allowed to decide. Credibility is a jury question.

Petitioners also rely on the following cases in support of this petition:

Shelley v. Kraemer, 334 U.S. 1, (1948)

Barrows v. Jackson, 346 U.S. 249

United States v. Continental Oil Company, 377 U.S. 61, (1964.)

CONCLUSION

The Court should grant a writ of certiorari, vacate the decision below, and remand this case

for trial on the merits, and/or in the alternative, decide this case on the merits upon the complete record.

Ultimately, establishing uniformity of constitutional doctrine is a core basis for the exercise of this court's jurisdiction, and the circumstances of this petition for a writ of certiorari clearly satisfies that fundamental criteria.

Respectfully submitted,

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